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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARINA GLENCOE, L.P., Plaintiff and Appellant, v. MALIBU ESCROW CORP. et al., Defendants and Respondents.	B203415 (Los Angeles County Super. Ct. No. SC084183)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Reversed and remanded.

Julian A. Simonis; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiff and Appellant.

Law Offices of Gary M. Gitlin and Gary M. Gitlin; Esner, Chang & Ellis, Andrew N. Chang and Stuart B. Esner for Defendant and Respondent Malibu Escrow Corp.

Greenwald, Pauly, Foster & Miller and Andrew J. Haley for Defendant and Respondent Malibu Holdings. L.P.

Marina Glencoe, L.P. sued Malibu Holdings, L.P. and Malibu Escrow Corp. for breach of contract arising out of a canceled real estate transaction. Both Malibu Holdings and Malibu Escrow filed cross-complaints. Following a bench trial, the court found in favor of Marina Glencoe but did not award it the full amount of prejudgment interest it sought. The court also denied Marina Glencoe's motion for attorney fees. Marina Glencoe challenges those decisions in this appeal. We reverse and remand with directions.

FACTUAL AND PROCEDURAL BACKROUND

A. *The Canceled Real Estate Transaction*

In November 2004 Marina Glencoe entered into an agreement to purchase an apartment building from Malibu Holdings with Malibu Escrow designated as the escrow company. Marina Glencoe subsequently deposited $100,000 into escrow.

Prior to the close of escrow Marina Glencoe advised Malibu Holdings and Malibu Escrow it did not approve the preliminary title report and was canceling the transaction. Malibu Escrow distributed draft cancellation instructions providing for return of Marina Glencoe's deposit less a $9,700 cancellation fee to be paid to Malibu Escrow by Marina Glencoe pursuant to the escrow instruction obligating the parties to pay "reasonable escrow fees for the services rendered" in the event the escrow failed to close.[1] Malibu Holdings, however, informed Malibu Escrow all contingencies for the sale had been removed and directed it to prepare new cancellation instructions providing that Malibu Holdings would retain $50,000 of the deposit for costs it had allegedly incurred as a result of the canceled transaction. On December 21, 2004 Malibu Escrow distributed amended cancellation instructions reflecting Malibu Holding's $50,000 claim and the payment to Malibu Escrow of a $9,700 fee.

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1 The escrow instructions permitted Malibu Escrow to apportion the fee between Marina Glencoe and Malibu Holdings "in a manner which, in [its] sole discretion, Escrow Holder considers equitable, and that Escrow Holder's decision will be binding and conclusive upon the parties."

B. *The Complaint and Cross-complaints*; *Failed Efforts To Resolve the Dispute*

On January 21, 2005 Marina Glencoe sued Malibu Holdings and Malibu Escrow for breach of contract and Malibu Escrow for negligence. Marina Glencoe alleged Malibu Holdings had breached its contract as the seller by failing to provide a full preliminary title report and wrongfully claiming it was entitled to retain $50,000 of Marina Glencoe's deposit. As to Malibu Escrow, Marina Glencoe alleged, in part, the $9,700 cancellation fee was not reasonable and Malibu Escrow had failed to apportion the fee between Marina Glencoe and Malibu Escrow. In addition to other damages, Marina Glencoe alleged it was entitled to recover tax liability damages it might suffer because the transaction was intended to be an Internal Revenue Code section 1031 tax-deferred exchange.

On March 4, 2005 Malibu Holdings filed a cross-complaint against Marina Glencoe for breach of contract and breach of the implied covenant of good faith and fair dealing, alleging Marina Glencoe did not have good cause to unilaterally cancel the transaction after the time for exercising the contingencies had passed. Malibu Holdings dismissed the cross-complaint on April 12, 2005 and essentially relinquished its $50,000 claim. In response to a settlement offer by Malibu Escrow and Malibu Holdings,[2] on April 8, 2005 Marina Glencoe demanded, in addition to return of its $100,000 deposit, payment of $35,000 in estimated tax liability damages and $40,000 in attorney fees and costs. The counteroffer was not accepted.

On January 19, 2006 Malibu Escrow filed a cross-complaint against Marina Glencoe for breach of contract and unjust enrichment, alleging $9,700 was a reasonable cancellation fee.

On August 31, 2006, pursuant to a request by Marina Glencoe, Malibu Holdings agreed to execute amended escrow instructions directing Malibu Escrow to immediately return Marina Glencoe's deposit and informing it that Malibu Holdings "makes no claims

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2 The terms of the offer, except Malibu Holdings's willingness to forgo its $50,000 claim, are not in the record on appeal.

as to any of the monies on deposit with Escrow." Malibu Escrow refused to refund the deposit. In connection with a subsequently filed application for writ of attachment, Malibu Escrow asserted it was entitled to retain the entire deposit to secure payment of the cancellation fee, as well as its legal fees.

On October 4, 2006 the trial court granted Malibu Escrow's motion for summary adjudication as to Marina Glencoe's negligence claim.

C. *The Trial Court's Judgment and Amended Judgment*

The matter proceeded as a bench trial in January 2007 with final arguments presented in briefs filed in March and April 2007. On August 30, 2007 the trial court filed a statement of decision finding Malibu Holdings had breached the purchase agreement by demanding $50,000 be withheld from Marina Glencoe's deposit, conduct the court described as "unjustified and overreaching." The court further found, "Because [Malibu Holdings] wrongfully demanded $50,000 of the deposit made by [Marina Glencoe]—half of [Marina Glencoe's] money on deposit in escrow and over which [Malibu Holdings] had no legitimate claim until escrow should close, [Malibu Holdings] is liable to [Marina Glencoe] for interest at the contract rate (7 %) on that amount pursuant to Civil Code [section] 3287, [subdivision] a. Such interest will run from December 21, 2004, the date of the wrongful demand."

With respect to Malibu Escrow, the court found it had "acted in bad faith in two respects: [1] in assessing such a large fee for a relatively simple—and canceled—transaction; and [2] in attempting to recover the fee from funds that [Malibu Escrow] held in trust for [Marina Glencoe]." The court found, however, Malibu Escrow was entitled to recover $1,000 on its cross-complaint from Marina Glencoe for services rendered in connection with the escrow.

In the judgment entered on August 30, 2007 the court ordered "1. [Marina Glencoe] shall recover from [Malibu Escrow] the sum of $100,000, being the amount the former deposited in escrow with the latter, without interest (as expressly provided for by the contract between the parties). [¶] [Marina Glencoe] shall recover from [Malibu

Holdings] the sum of $9,416.43, representing interest on $50,000 wrongfully claimed by said defendant for the period specified in the Statement of Decision."

On September 14, 2007 Malibu Holdings moved to vacate and/or correct the judgment, arguing Marina Glencoe was entitled to interest, at most, through August 31, 2006—the date it and Marina Glencoe had instructed Malibu Escrow to return the $100,000 deposit—not through the date of judgment. In its opposition Marina Glencoe contended, not only was it entitled to interest for the period originally awarded, but also the court had erred in calculating interest at 7 percent, instead of 10 percent—the statutory rate applicable to breach of contract cases when the contract does not specify a rate of interest.

At a hearing on October 17, 2007 the court ruled Marina Glencoe was entitled to interest only through August 31, 2006 and 7 percent was the applicable interest rate. An amended judgment was entered on October 17, 2007 reducing the interest due Marina Glencoe to $5,826 and adding a reference to Malibu Escrow's recovery of $1,000 on its cross-complaint, which, although noted in the statement of decision, had been inadvertently omitted from the judgment.

D. *The Trial Court's Denial of Marina Glencoe's Motion for Attorney Fees*

On September 5, 2007 Marina Glencoe moved to recover more than $380,000 in attorney fees incurred in prosecuting the action against both defendants pursuant to Civil Code section 1717.[3] Marina Glencoe argued an attorney fee provision in the purchase agreement authorized it to recover its fees from Malibu Holdings[4] and paragraphs 21 and

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3 Statutory references are to the Civil Code unless otherwise indicated.

4 Paragraph 13.3 of the purchase agreement ("Attorneys' Fees") provides, "In the event of any action or proceeding with respect to this Agreement or the transactions contemplated hereby, the prevailing party in any action or proceeding shall be entitled to recover its attorneys' fees and costs."

24 in the escrow instructions, when read together, authorized it to recover its fees from Malibu Escrow.[5]

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[5] Paragraph 21 of the escrow instructions provides, "The parties shall cooperate with Escrow Holder in carrying out the escrow instructions they deposit with Escrow Holder and completing this escrow. The parties shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are necessary to enable Escrow Holder to comply with demands made on Escrow Holder by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instructions and close this escrow. If conflicting demands or notices are made or served upon Escrow Holder or any controversy arises between the parties or with any third person arising out of or relating to this escrow, Escrow Holder shall have the absolute right to withhold and stop all further proceedings in, and in performance of, this escrow until Escrow Holder receives written notification satisfactory to Escrow Holder of the settlement of the controversy by written agreement of the parties, or by the final order or judgment of a court of competent jurisdiction.

"All of the parties to this escrow, jointly and severally, promise to pay promptly on demand, as well as to indemnify Escrow Holder and to hold Escrow Holder harmless from and against all administrative governmental investigations, audit and legal fees, litigation and interpleader costs, damages, judgments, attorneys' fees, arbitration costs and fees, expenses, obligations and liabilities of every kind (collectively 'costs') which in good faith Escrow Holder may incur or suffer in connection with or arising out of this escrow, whether said costs arise during the performance of or subsequent to this escrow, directly or indirectly, and whether at trial, or on appeal, in administrative action, or in an arbitration. Escrow Holder is given a lien upon all the rights, titles and interests of the parties and all escrow papers and other property and monies deposited into this escrow to protect Escrow Holder's rights and to indemnify and reimburse Escrow Holder. If the parties do not pay any fees, costs or expenses due Escrow Holder under the escrow instructions or do not pay for costs and attorneys' fees incurred in any litigation, administrative action and/or arbitration, on demand, they each agree to pay a reasonable fee for any attorney services which may be required to collect such fees or expenses, whether attorneys' fees are incurred before trial, at trial, on appeal or in arbitration."

Paragraph 24 of the instructions provides in part, "Should demands be made upon Escrow Holder, Escrow Holder may withhold and stop all further proceedings in this escrow without liability for interest on funds held or for damages until mutual cancellation instructions signed by all parties shall have been deposited with Escrow Holder. The parties, jointly and severally, agree that if this escrow cancels or is otherwise terminated and not closed, the parties shall pay for any costs and expenses which Escrow Holder has incurred or have [*sic*] become obligated for under these escrow instructions, including, but not limited to, attorneys' fees, arbitration fees and costs and reasonable escrow fees for the services rendered by Escrow Holder, the parties agree that

At a hearing on October 17, 2007 the trial court found Marina Glencoe was not entitled to recover attorney fees from Malibu Holdings because, although there was a valid attorney fee provision in the purchase agreement, there was no prevailing party.

With respect to Malibu Escrow, the court stated it had "determine[d] that Marina Glencoe is the prevailing party." Subsequently the court inquired whether "Malibu Escrow's position [was] in any respect that this contract doesn't qualify under [section] 1717 as a bilateral attorneys fees provision . . . ." Counsel for Malibu Escrow responded, "[W]e haven't asserted that issue, and it's not a point for us." After the parties then argued about the amount of fees and the appropriate allocation between the claims involving Malibu Holdings and those related to Malibu Escrow, the court took the matter under submission.

In a minute order entered October 17, 2007 the court directed Malibu Escrow and Marina Glencoe to provide briefing on the issue it had raised during oral argument: Whether the provisions in the escrow agreement authorizing recovery of attorney fees were limited to fees arising out of Malibu Holdings and Marina Glencoe's obligation to indemnify Malibu Escrow in the event of litigation concerning conflicting demands made on Malibu Escrow or more broadly permitted recovery of any attorney fees incurred in an action to enforce the escrow instructions. The court directed the parties to address *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328 (*Campbell*) [refusing to award attorney fees based on an indemnification clause in escrow instructions].

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such costs and expenses shall be paid and deposited in escrow before any cancellation or other termination of this escrow is effective. The parties agree that said charges for expenses, costs and fees may be apportioned between Buyer and Seller in a manner which, in their [*sic*] sole discretion, Escrow Holder considers equitable, and that Escrow Holder's decision will be binding and conclusive upon the parties. Upon receipt of mutual cancellation instructions or a final order or judgment of a court of competent jurisdiction with accompanying writs of execution, levies or garnishments, Escrow Holder is instructed to disburse the escrow funds and instruments in accordance with such cancellation instruction, order or judgment and accompanying writ and this escrow shall, without further notice be considered terminated and cancelled."

On January 29, 2008 the court denied Marina Glencoe's motion for attorney fees as to Malibu Escrow, holding the escrow instructions had "'only' a limited provision indemnifying the escrow holder," not a general attorney fees clause applicable to the dispute over what constituted a reasonable fee for Malibu Escrow's services.

CONTENTIONS

As to Malibu Holdings, Marina Glencoe contends the trial court erred in determining the applicable interest rate was 7 percent, not 10 percent; in reducing the period for which it was entitled to interest to August 31, 2006; and in finding there was no prevailing party for the purpose of an award of attorney fees. As to Malibu Escrow, Marina Glencoe contends the court erred in denying it prejudgment interest and in finding there was no applicable attorney fees provision in the escrow instructions.

DISCUSSION

Issues Related to Malibu Holdings

1. *The Trial Court Erred in Reducing the Interest Period and Calculating Interest at 7 Percent*

Section 3287, subdivision (a), provides for the payment of prejudgment interest to every person entitled to receive damages that are certain or capable of being made certain by calculation if the right to receive such damages vested on a particular day. "Under section 3287, subdivision (a) the court has no discretion, but must award prejudgment interest upon request, from the first day there exists both a breach and a liquidated claim." (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828.) "The policy underlying authorization of an award of prejudgment interest is to compensate the injured party—to make that party whole for the accrual of wealth which could have been produced during the period of loss." (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790; accord, *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.)

The elements of an award of prejudgment interest against Malibu Holdings are indisputably present. By directing Malibu Escrow to distribute amended cancellation instructions—distributed by Malibu Escrow on December 21, 2004—that wrongfully

asserted its entitlement to $50,000 of Marina Glencoe's $100,000 deposit, Malibu Holdings damaged Marina Glencoe in an amount certain ($50,000) with a right to recover vested in Marina Glencoe on a particular day (December 21, 2004). Under section 3287, subdivision (a), Marina Glencoe was thus entitled to prejudgment interest from that date through the date of judgment.

Although Malibu Holdings executed revised instructions directing Malibu Escrow to immediately return all of Marina Glencoe's deposit on August 31, 2006, the trial court erred in shortening the interest accrual period to that earlier date. To be sure, as Malibu Holdings contends, it had essentially agreed to relinquish its $50,000 claim at least by this time.[6] But, even if Marina Glencoe's failure to recover its full deposit after August 31, 2006 was solely due to Malibu Escrow's unwillingness to release the funds because of its separate fee dispute with Marina Glencoe, that fact is irrelevant to determining the proper prejudgment interest period. To the extent Malibu Holdings wanted to limit the accrual of prejudgment interest—an element of Marina Glencoe's damages (*North Oakland Medical Clinic v. Rogers*, *supra*, 65 Cal.App.4th at p. 830 ["[i]t is well established that prejudgment interest is not a cost, but an element of damages"])—it was incumbent upon it to actually settle its dispute with Marina Glencoe even if that necessitated, for example, paying Marina Glencoe the $50,000 it had wrongfully claimed and filing a cross-claim against Malibu Escrow to recover the sum held by the escrow company. Simply stated, prejudgment interest is calculated through the date of entry of judgment. The trial court has no discretion to shorten the period for which it is awarded.

The trial court also erred in calculating interest at 7 percent. When there is no different rate specified in an applicable statute, the prejudgment interest rate is 7 percent under the California Constitution. (*Pacific-Southern Mortgage Trust Co. v. Insurance Co. of North America* (1985) 166 Cal.App.3d 703, 716 ["[i]n the absence of any

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6 Although Malibu Holdings contends it had agreed to forgo its claim at an earlier date, it nevertheless mounted a full defense at trial, including arguing Marina Glencoe had breached the contract by canceling the transaction after all its contingencies had expired.

legislative act to the contrary, the rate of prejudgment interest is 7 percent"]; Cal. Const., art. XV, § 1.) In the case of a breach of contract, however, section 3289, subdivision (b), provides, "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

At the October 17, 2007 hearing on Malibu Holding's motion to amend the judgment, the trial court explained it had utilized the 7 percent interest rate because "[i]t really isn't a contract rate. If anything, it was a tort by Malibu. . . . It's not a breach of contract. It's a court remedy." This observation by the trial court, while perhaps understandable—the measure of damages assessed in some respects resembles a recovery in tort—directly conflicts with its earlier findings, expressed in the statement of decision, that Malibu Holdings's demand through escrow for $50,000 as damages for the failed transaction "was contrary to the terms of its Agreement with [Marina Glencoe]" and "breached [Malibu Holdings's] *obligation under paragraph 4.1 of the Agreement* that [Marina Glencoe] was to receive its deposit back under the circumstances of this case." (Italics added.)[7] As the court found and the record reflects, the cause of action tried and the claim upon which Marina Glencoe prevailed involved a breach of contract (the parties' purchase agreement) and thus fall within the ambit of section 3289, subdivision (b).

Malibu Holdings is correct, as a purely technical matter, that the trial court did not award $50,000 in contract damages against it and then assess interest on that sum as prejudgment interest, but appeared instead to determine the lost interest was itself the only recoverable damages. The amended judgment, entered against both Malibu Holdings and Malibu Escrow, directs Malibu Escrow to return the full deposit (less $1,000) to Marina Glencoe. However, this practical evaluation by the court of who actually held the money due Marina Glencoe and how it could efficiently be returned to

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[7] These express findings also refute Malibu Holdings's contention section 3289, subdivision (b), cannot be applicable because there was no "obligation" within the meaning of that statute for purposes of utilizing the 10 percent interest rate.

its rightful owner does not in any way detract from the court's express determination that Malibu Holdings is liable to Marina Glencoe, not for interest as damages, but for prejudgment interest under section 3287, subdivision (a), for funds wrongfully withheld.

Because of these errors in both the rate and period for determining the interest award, the judgment is reversed; and the matter remanded for a recalculation of prejudgment interest.

2. *The Trial Court Should Reconsider Its Determination There Was No Prevailing Party for the Purpose of Awarding Attorney Fees in Light of This Decision*

a. *Marina Glencoe's appeal from denial of attorney fees from Malibu Holdings is timely*

Judgment was initially entered in this matter on August 30, 2007. Marina Glencoe moved for an award of attorney fees against both Malibu Holdings and Malibu Escrow on September 5, 2007. On October 17, 2007, as against Malibu Holdings, the court "determined there is no prevailing party," but requested further briefing with respect to Marina Glencoe's motion as to Malibu Escrow. Although Marina Holdings's counsel filed and served a notice of ruling stating the court had denied the motion as it pertained to fees sought against Malibu Holdings on October 17, 2007, there was, in fact, no formal order denying the portion of the attorney fee motion directed to Malibu Holdings on that date; and the amended judgment entered by the court on October 17, 2007 provided only, "Attorney fees are awarded pursuant to post-trial motion heard and determined as provided by law." On January 29, 2008, after considering briefing and argument as to Malibu Escrow, the court formally denied Marina Glencoe's motion for attorney fees in its entirety and directed the clerk to "enter 'zero' in the relevant portion of the Judgment." Marina Glencoe filed its notice of appeal from the January 29, 2008 posttrial order denying its motion for attorney fees on March 24, 2008.

Marina Glencoe's March 24, 2008 notice of appeal plainly is intended to cover the trial court's denial of its motion for attorney fees as to both Malibu Holdings and Malibu Escrow. (See Cal. Rules of Court, rule 8.100(a)(2) ["notice of appeal must be liberally construed"].) Nonetheless, Malibu Holdings argues the appeal is not timely because it

was not filed within 60 days of the court's October 17, 2007 decision there was no prevailing party as between Marina Glencoe and Malibu Holdings. Even were we to accept Malibu Holdings's contention that the court actually denied the motion on October 17, 2007, rather than on January 29, 2008, and entered an appealable order on that date, we reject its argument Marina Glencoe's appeal is not timely.

The October 17, 2007 minute order in which the court determined Marina Glencoe was not entitled to recover attorney fees from Malibu Holdings is not entitled "Notice of Entry" of order (that language does not appear until page four of five as part of the clerk's certification of mailing), nor is it file-stamped as required under California Rules of Court, rule 8.104(a) to trigger the 60-day period to file a notice of appeal. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905 ["we conclude that rule 8.104(a)(1) does indeed require a single document—either a 'Notice of Entry' so entitled or a file-stamped copy of the judgment or appealable order—that is sufficient in itself to satisfy all of the rule's conditions"]; *id.* at p. 902 [typed or printed notation at bottom of order indicating date minutes were entered by county clerk is not a file stamp]; *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 259 ["14-page minute order with the notice of entry language on page 13 does not comply with the literal requirement that the document providing notice of entry be *so entitled*"].) And Malibu Holdings's "Notice of Ruling" is similarly insufficient to trigger the shorter, 60-day period for a notice of appeal. (See *Sadler v. Turner* (1986) 186 Cal.App.3d 245, 248 ["notice of ruling . . . is not a '"written notice of entry of judgment" that would start the 60-day period running'"]; *Call v. Los Angeles County Gen. Hosp.* (1978) 77 Cal.App.3d 911, 915 [same].) Thus, Marina Glencoe had 180 days to file its notice of appeal; and its March 24, 2008 notice fell within this period.

b. *Governing law*

Section 1717, subdivision (a), authorizes the trial court to award reasonable attorney fees to the prevailing party in a contract action if the contract specifically

provides for an award of such fees.[8] "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (§ 1717, subd. (b)(1).) However, section 1717, subdivision (b)(1), also authorizes the trial court to "determine that there is no party prevailing on the contract for purposes of this section."[9]

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded or failed to succeed in its contentions.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) When the judgment is a "'simple, unqualified win'" for one party on the only contract claims presented at trial, a trial court has no discretion to deny an attorney fee award to that party under section 1717. (*Ibid.*; see also *id.* at pp. 875-876 ["when the decision on the litigated contract claims is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant"].) Thus, a party "whose litigation success is not fairly disputable" can claim attorney fees as a matter of right. (*Id.* at p. 876.) When both parties seek relief on

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8 Section 1717, subdivision (a), provides in part, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit."

9 Although the trial court concluded Marina Glencoe was not the prevailing party for the purpose of awarding attorney fees, it was the prevailing party for awarding other costs authorized by Code of Civil Procedure section 1032 because that section defines prevailing party to include "the party with a net monetary recovery . . . ." (Code Civ. Proc., § 1032, subd. (a)(4).) Marina Holdings does not dispute Marina Glencoe was entitled to costs other than attorney fees.

a contract but neither party is completely successful, however, the trial court retains discretion to determine there is no prevailing party under section 1717. (*Id.* at p. 875.) "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) Typically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought. In other words, the judgment is "'considered good news and bad news as to each of the parties.'" (*Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 60.)

We will not disturb a trial court's finding there was no prevailing party in the litigation unless there is a clear showing of abuse of discretion. (*Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 58; see *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456 [no abuse of discretion where trial court "apparently concluded that fairness dictated each side should pay its own attorneys' fees"]; see also *Hsu v. Abbara, supra,* 9 Cal.4th at p. 877 ["[w]e agree that *in determining litigation success,* courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations'"].)

c. *The trial court should reconsider its determination there was no prevailing party*

Marina Glencoe's judgment against Malibu Holdings was not an unqualified victory: Marina Glencoe recovered only a portion of the damages it had initially sought, creating a "mixed result" case. As the *Hsu* Court instructed, the prevailing party determination should take into consideration the parties' litigation objectives "as disclosed by the pleadings, trial briefs, opening statements and similar sources." (*Hsu v. Abbara, supra,* 9 Cal.4th at p. 876.) According to its complaint, in addition to seeking damages from Malibu Holdings of $50,000—the amount of the allegedly wrongful claim—Marina Glencoe sought damages for a tax liability resulting from its failure to complete the transaction, which had been structured as a tax-free exchange. Marina

Glencoe valued that damage item at $35,000. It was only after about 16 months of litigation that Marina Glencoe agreed it would not pursue these purported damages.

Contrary to Marina Glencoe's assertion, *Santisas v. Goodin* (1998) 17 Cal.4th 599 does not preclude the trial court from taking into consideration its voluntary dismissal of this damage claim in determining the prevailing party. Section 1717, subdivision (b)(2), at issue in *Santisas*, provides that, "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." That section has no bearing on whether the court may take into consideration voluntary dismissal of some portion of the plaintiff's damages claim in determining which party has prevailed in a case litigated to judgment, and nothing in *Santisas* suggests to the contrary. Indeed, such an interpretation would be squarely at odds with the *Hsu* Court's guidance on determining litigation success. As a mixed outcome case—heavily litigated as demonstrated by the volume of the briefs, the number of skirmishes and ultimately the amount of attorney fees incurred in pursuit of modest damages—the trial court had broad discretion to determine whether any party prevailed. Inasmuch as the case must be remanded for recalculation of the prejudgment interest due Marina Glencoe, the trial court should also reexamine whether Marina Glencoe's additional success in this regard alters the court's determination there was no prevailing party.

Issues Related to Malibu Escrow

1. *The Trial Court Erred in Determining Marina Glencoe Was Not Entitled to Prejudgment Interest*

The trial court held Malibu Escrow had violated its contractual obligation to Marina Glencoe, as well as acted in bad faith and breached its fiduciary duty, by assessing an unreasonable cancellation fee. The court's amended judgment directed Malibu Escrow to return the full $100,000 deposit to Marina Glencoe, less only a $1,000 cancellation fee. Nonetheless, the court declined to award any prejudgment interest as to Malibu Escrow, relying on a provision in the escrow instructions that shielded Malibu Escrow from liability when confronted with conflicting demands by a buyer and seller:

"Should demands be made upon Escrow Holder, Escrow Holder may withhold and stop all further proceedings in this escrow without liability for interest on funds held or for damages until mutual cancellation instructions signed by all parties shall have been deposited with Escrow Holder." This provision, however, does not entirely foreclose an award of prejudgment interest in this case because Malibu Escrow was presented with mutual cancellation instructions signed by all parties on August 31, 2006, a full year before judgment was entered on Marina Glencoe's claim.[10] After that date Malibu Escrow was no longer protected from liability for interest, having chosen to retain the entire deposit—wrongly, as the court found—as security for its claim for fees.

Independent of the escrow instructions' provision protecting it from interest charges, Malibu Escrow contends no award of prejudgment interest is warranted in this case because the amount of Marina Glencoe's recovery could not be calculated with certainty until the court determined its reasonable escrow fee. "The test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a), is whether 'defendant actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount.'" (*Cassinos v. Union Oil Co.*, *supra*, 14 Cal.App.4th at p. 1789; accord, *Roodenburg v. Pavestone Co., L.P.* (2009) 171 Cal.App.4th 185, 190-191.) "'The statute [Civil Code section 3287] does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor." [Citations.]' [Citation.] Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate." (*Wisper Corp. v. California Commerce Bank*, *supra*, 49 Cal.App.4th at p. 960.) An injured party's entitlement to prejudgment interest, however, is not lost by the opposing party's assertion, as here, of an unliquidated cross-claim: "[T]he legal interest allowable under [Civil Code] section 3287

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10 As a question of contract interpretation, absent conflicting extrinsic evidence, our review is de novo. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

cannot be defeated by setting up an unliquidated counterclaim as an offset." (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907; accord, *Wisper Corp.*, at p. 960.)

Marina Glencoe's breach of contract claim for the return of its $100,000 deposit sought damages in an amount certain; and, as to Malibu Escrow, its right to recover that sum vested no later than August 31, 2006. The trial court found Malibu Escrow was contractually obligated to return the full deposit and "had no right to make a claim on the $100,000 on deposit." The court further found Malibu Escrow had acted in bad faith in attempting to recover its fee from the deposit. That Malibu Escrow may have been awarded $1,000 on its cross-complaint does not invalidate Marina Glencoe's entitlement to be made "whole for the accrual of wealth which could have been produced" on its $100,000 deposit wrongfully withheld since August 31, 2006. (*Cassinos v. Union Oil Co.*, *supra*, 14 Cal.App.4th at p. 1790.)[11]

2. *The Trial Court Erred in Determining the Escrow Instructions Did Not Provide for an Award of Attorney Fees*

The escrow instructions provide Malibu Escrow has no duty to resolve disputes or reconcile conflicting demands between the principals to the escrow. And paragraphs 21 and 24 of the instructions, quoted at note 5, above, impose on the principals the obligation to indemnify and reimburse Malibu Escrow for any expenses, including attorney fees, incurred as a result of any such disagreements. Recognizing under established case law—including *Campbell*, *supra*, 78 Cal.App.4th 1328, which the court asked Marina Glencoe and Malibu Escrow to address in supplemental briefing—that the inclusion of attorney fees as an item of loss in a third-party indemnity provision "does not constitute a provision for the award of attorney fees in an action on contract as is required to trigger operation of Civil Code section 1717" (*Campbell*, at p. 1337; accord, *Otis Elevator Co. v. Toda Construction* (1994) 27 Cal.App.4th 559, 564 [absent explicit

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11 In assessing prejudgment interest against both Malibu Holdings and Malibu Escrow on remand, of course, the trial court must avoid an award that provides Marina Glencoe with a double or duplicative recovery.

language authorizing recovery of attorney fees to enforce contract, indemnity agreement authorizing attorney fees as element of damages does not encompass recovery of attorney fees incurred in actions to enforce contract]; *Myers Building Industries, Ltd. v. Interface Technology Inc.* (1993) 13 Cal.App.4th 949, 970 [same]), the trial court denied Marina Glencoe's request for attorney fees from Malibu Escrow. The court explained, "Considering all of the relevant provisions of these escrow instructions, they indemnify the escrow holder from virtually all costs and fees in the event of certain circumstances, including litigation—such as the instant litigation. There is no general attorneys fees clause, no provision of this escrow that permits the award of fees to Marina Glencoe in this litigation under these circumstances. Rather, there is 'only' a limited provision indemnifying the escrow holder."

The trial court was correct that there is no "general" attorney fee clause in the escrow instructions. However, the court erred in concluding section 1717 was inapplicable to the escrow instructions and Marina Glencoe was not entitled to an award of attorney fees if it was the prevailing party in its dispute with Malibu Escrow.[12] Paragraph 24 of the instructions obligated the principals to the escrow to pay Malibu Escrow reasonable fees for its services if, as here, the escrow was canceled or otherwise terminated. With respect to those fees—or, for that matter, any other fees, costs or expenses due to Malibu Escrow—paragraph 21 provides, "If the parties do not pay any fees, costs or expenses due Escrow Holder . . . , they each agree to pay a reasonable fee for any attorney services which may be required to collect such fees or expenses, whether attorneys' fees are incurred before trial, at trial, on appeal or in arbitration." Although this narrow attorney fee provision is restricted to efforts by Malibu Escrow to collect fees to which it may be entitled and by its terms does not apply generally to any dispute

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[12] Because the trial court interpreted the escrow instructions without resorting to extrinsic evidence, we review the contract de novo, "exercising our independent judgment in interpreting the clause[s] without giving any deference to the trial court's ruling." (*Campbell*, *supra*, 78 Cal.App.4th at p. 1336; see *Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 608.)

arising out of the escrow transaction, section 1717 extends the reach of the attorney fee provision to the entire contract: "Where a contract provides for attorney's fees . . . , that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (§ 1717, subd. (a), 2d par.) "Thus, parties may not limit recovery of attorney fees to a particular type of claim, such as failure to pay escrow costs." (*Paul v. Schoellkopf* (2005) 128 Cal.App.4th 147, 153.)

In *Paul v. Schoellkopf, supra,* 128 Cal.App.4th 147, the escrow instructions contained a narrow attorney fee provision substantively identical to the provision in this case. As our colleagues in Division Four of this court explained, "By this provision, the escrow company and the parties manifested an intent to pay attorney fees to the escrow company if its fees or expenses went unpaid and an attorney's services were required to collect them." (*Id*. at p. 152.) The court declined to extend this provision to disputes between the buyer and seller that had nothing to do with the performance of escrow services (*id*. at pp. 153-154), but expressly noted, "section 1717 would have made this right reciprocal had the lawsuit been over the performance of the escrow." (*Id*. at p. 152.) That, of course, is precisely the nature of the lawsuit between Marina Glencoe and Malibu Escrow.

Based on comments made at the October 17, 2007 hearing on attorney fees, it appears the trial court viewed Marina Glencoe as the prevailing party in its litigation with Malibu Escrow. Because it ultimately concluded there was no attorney fee provision in the escrow instructions, however, the court did not finally rule on that issue. Accordingly, we reverse the post-judgment order denying attorney fees to Marina Glencoe and remand the matter for the court to determine if Marina Glencoe is the prevailing party and, if so, to award it its reasonable attorney fees under section 1717.

DISPOSITION

The judgment and post-judgment fee order are reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. Marina Glencoe is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.